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U.S. Citizenship
and Immigration
Services

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FILE:



Office: SAN FRANCISCO

Date:

JAN 12 2006

IN RE:

Applicant:



APPLICATION:

Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), amended by Life Act Amendments, Pub. L. 106-554, 114 Stat. 2763 (2000).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the District Director, San Francisco, California and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The district director concluded that the applicant had been convicted of at least three misdemeanors in the United States. The director also concluded that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act). As such, the director denied the application.

On appeal, counsel submits the applicant's court dispositions and court documentation from the Kern County Superior Court, which reduced some of the misdemeanor convictions to infractions.

The regulation at 8 C.F.R. § 245a.18(a) states in part that an alien who has been convicted of a felony or three or more misdemeanors committed in the United States is ineligible for adjustment to LPR status.

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under the term "felony," pursuant to 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

The record reflects the applicant's criminal history in the State of California:

1. On November 21, 1988, the applicant was charged with driving without a license. On December 2, 1988, the applicant was charged with failure to appear. On July 6, 1989, the applicant was convicted of both misdemeanor offenses. The applicant was sentenced to serve five days in jail and ordered to pay a fine. On July 26, 2004, the applicant filed a motion to reduce the misdemeanor convictions to infractions. On August 11, 2004, the motion was [REDACTED]
2. On July 5, 1989, the applicant was charged with giving false identification to a peace officer and driving without a license. On July 6, 1989, the applicant was convicted of both misdemeanor offenses. The applicant was sentenced to serve five days in jail. On July 26, 2004, the applicant filed a motion to reduce the misdemeanor convictions to infractions. On August 11, 2004, the motion was granted for the conviction of driving without a license [REDACTED]
3. On January 11, 1990, the applicant was charged with driving under the influence, driving with .08 percent or more alcohol in the blood and driving while license is suspended or revoked. On February 5, 1990, the applicant was charged with failure to appear. On February 7, 1991, the applicant was convicted of driving under the influence, driving while license is suspended or revoked, and failure to appear, all misdemeanor offenses. For the driving under the influence conviction, the applicant was sentenced to serve two weekends in jail. For all of his convictions, the applicant was ordered to pay a fine, and placed on probation for four years. On July 26, 2004, the applicant filed a motion to reduce the misdemeanor convictions to infractions. On August 11, 2004, the motion was granted for the convictions of driving while license is suspended or revoked and failure to appear. Case no. [REDACTED]
4. On September 27, 1990, the applicant was charged with driving while license is suspended or revoked. On October 30, 1990, the applicant was convicted of this misdemeanor offense, ordered to pay a fine, and placed on probation for three years. On July 2, 2004, the applicant filed a motion to reduce the misdemeanor conviction to an infraction. On July 14, 2004, the motion was granted. Case [REDACTED]

5. On December 26, 1990, the applicant was charged with driving while license is suspended or revoked. On January 10, 1991, the applicant was convicted of this misdemeanor offense. The applicant was sentenced to serve ten days in jail, ordered to pay a fine, and placed on probation for three years. On July 2, 2004, the applicant filed a motion to reduce the misdemeanor conviction to an infraction. On July 14, 2004, the motion was granted [REDACTED]
6. On January 29, 1991, the applicant was charged with driving while license is suspended or revoked for other reasons. On February 14, 1991, the applicant was convicted of this misdemeanor offense. The applicant was sentenced to serve five days in jail, ordered to pay a fine, and placed on probation for three years. On July 2, 2004, the applicant filed a motion to reduce the misdemeanor conviction to an infraction. On July 14, 2004, the motion was [REDACTED]
7. On March 2, 1992, the applicant was charged with charged with driving while license is suspended or revoked. On July 19, 1993, the applicant was convicted of this misdemeanor offense. The applicant was sentenced to serve five days in jail, ordered to pay a fine, and placed on probation for three years. [REDACTED]
8. On April 1, 1996, the applicant was charged with driving while license is suspended or revoked. On April 17, 1996, the applicant was charged with failure to appear. On May 27, 1997, the applicant was convicted of driving while license is suspended or revoked for other reasons, a misdemeanor. The applicant was sentenced to serve 30 days in jail, ordered to pay a fine, and placed on probation for three years. The remaining offense was dismissed. On July 2, 2004, the applicant filed a motion to reduce the misdemeanor conviction to an infraction. On July 14, 2004, the motion was granted. Case [REDACTED]

Regarding numbers three and four above, a misdemeanor is a crime punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served. Although Citizenship and Immigration Services regulations provide an exception for crimes which carry a *maximum* penalty of a jail sentence of five days or less, an alien who has been convicted of crimes for which he could have received a jail sentence of more than five days is deemed to have been convicted of misdemeanors. The punishment he actually received is irrelevant. In the instant case, the applicant was convicted of offenses which California law describes as misdemeanors. A first offense of driving under the influence is punishable in the county jail by up to six months in jail. A first offense of driving while license is suspended is punishable in the county jail by up to six months and a second offense within five years of a prior offense of driving while license is suspended is punishable by up to one year.

Under the statutory definition of "conviction" provided at Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. The Board of Immigration Appeal (BIA) found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Therefore, despite the reduction of the applicant's convictions, the applicant remains convicted, for immigration purposes, of the misdemeanor offenses above.

Counsel, on appeal, asserts that the interviewing officer issued a written request for court records from “two cases, including the DUI and gave no indication that any other records were required.” Counsel states that under those circumstances, it was reasonable for the applicant to conclude that no other records were required. Counsel’s assertion is without merit. The record reflects the Request for Additional Evidence issued at the time of the applicant’s interview requested that the applicant submit a copy of arrest records and certified final dispositions of “ALL” arrests which included the two arrests in Bakersfield, California. In addition, prior to the applicant’s interview, the director issued a notice which informed the applicant of his interview on July 14, 2003. The notice also informed the applicant of documentation to bring including “a certified copy of court records for *each* arrest.”

The director, in denying the application, found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act because he willfully misrepresented material information in order to gain an immigration benefit namely, his failure to disclose his July 2, 1989 arrest.

It must be noted that such grounds of inadmissibility may be waived pursuant to section 245A(d)(B)(i) of the Act, 8 C.F.R. § 245a.18(c). However, given the applicant’s misdemeanor convictions, he is ineligible for permanent residence under section 1104 of the LIFE Act and, therefore, the issuance of an application for waiver of inadmissibility is moot.

The applicant is ineligible for the benefit being sought due to his ten misdemeanor convictions. 8 C.F.R. § 245a.11(d)(1) and 8 C.F.R. § 245a.18(a). Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.